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No.

SEP 10 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARDING, DAHM & COMPANY, INC.,

Petitioner,

vs.

RUDY LIGHTSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does full faith and credit apply to final adjudications of state administrative agencies so that a federal court cannot refuse to grant collateral estoppel effect to a specific finding of the agency material to that agency's final decision on the ground that the agency did not have jurisdiction to make the finding when the finding was necessary to decide an issue a state statute required the agency to adjudicate and when no other state law denies that jurisdiction.

2. Do principles of federal-state comity apply to final adjudications of state administrative agencies made pursuant to a requirement imposed by the state legislature so that a federal court, sitting in a diversity case, cannot refuse to grant collateral estoppel effect to a specific finding of the agency material to that agency's final decision on the ground of lack of jurisdiction unless that court can cite law of the state clearly demonstrating lack of jurisdiction.

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Indiana is unpublished and appears in the Appendix hereto. The opinion of the United States Court of Appeals for the Seventh Circuit will be published shortly and appears in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on June 12, 1980. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTION, STATUTES AND REGULATIONS

Article IV, Section 1 of the Constitution provides:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U.S.C. Sec. 1738 provides as follows:

> "§1738. State and Territorial statutes and judicial proceedings; full faith and credit. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal

of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." June 25, 1948, c. 646, 62 Stat. 947.

28 U.S.C. Sec. 1739 provides as follows:

"§1739. State and Territorial nonjudicial records; full faith and credit. All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken." June 25, 1948, c. 646, 62 Stat. 947.

Indiana Code 4-22-1-14 provides as follows:

"4-22-1-14 [63-3014]. Judicial Review—Courts—Procedure. Any party or person aggrieved by any order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act [4-22-1-1—4-22-1-30]. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
(2) Contrary to constitutional right, power, privilege or immunity; or
(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
(4) Without observance of procedure required by law; or
(5) Unsupported by substantial evidence.

Said petition for review shall be filed within fifteen (15) days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed in section 6 [4-22-1-6] of this act. Unless a proceeding for review is commenced by so filing of such petition within fifteen (15) days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

Written notice of the filing of such verified petition for review and a copy of said petition shall be personally served upon the agency and the attorney general. Where the agency consists of more than one member it shall be personally served upon the secretary or chairman of such agency.

Any party or person so filing such verified petition for review with such court shall within fifteen (15) days thereafter secure from such agency a certified copy of the transcript of said proceedings before the agency including the order or administrative adjudication sought to be reviewed and file the same with the clerk of such court in which such action for review is pending. An extension of time in which to file such transcript shall be granted by said court in which such action for review is pending for good cause shown. Inability to obtain such transcript within time shall be good cause. Failure to file such transcript within said period of fifteen (15) days, or to secure an extension of time therefor, shall be cause for the dismissal of such petition for review by the court or on petition of any party of record to the original proceeding. When more than one person may be aggrieved by the administrative adjudication only one (1) proceeding for review may be had and the court in which a petition for review is first properly filed shall have jurisdiction. All persons who were parties to the hearing before the agency shall be made parties to the petition for review and shall be notified thereof by the person filing such petition." [Acts 1947, ch. 365, §14, p. 1451; 1957, ch. 355, §4, p. 1033.]

Indiana Code 25-34-1-16 provides as follows:

"25-34-1-16 [63-2415]. Denial, refusal to renew, revocation, or suspension of license—Fines—Unprofessional conduct.—The commission shall, after approval by a majority of all of its members, deny, refuse to renew, revoke, or suspend any license issued under this chapter and levy fines not to exceed five hundred dollars ($500) when the commission finds, after notice and hearing, that any licensee has violated this chapter, has violated any of the rules and regulations promulgated by the commission, has engaged in activity in connection with his license which activity is found to be fraud,

misrepresentation, or incompetency, or has been guilty of unprofessional conduct, which includes the following:

(1) Failure to account and remit any moneys or documents coming into his possession belonging to others.

(2) Accepting, giving, or charging any undisclosed commission, rebate, or direct profit on expenditures made for a principal.

(3) Acting in a dual capacity of broker and undisclosed principal in any transaction.

(4) Guaranteeing, or permitting any person to guarantee, future profits which may result from the resale of real property.

(5) Offering real property for sale, exchange, rent, or lease without the written consent of the owner or his authorized agent or on any terms other than those authorized by the owner or his authorized agent.

(6) Inducing any party to a contract of sale to break such a contract for the purpose of substituting, in lieu thereof, a new contract with another principal.

(7) Accepting employment or compensation for appraising real property contingent upon the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest, unless the interest is disclosed in the report.

(8) Negotiating a sale, exchange or lease of real property directly with an owner or lessor if he knows that the owner has a written outstanding contract, in connection with the property, granting an exclusive agency to another broker.

(9) Soliciting, selling or offering for sale real property by offering "free lots" or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property.

(10) Representing or attempting to represent a real estate broker, other than the associated broker, without the express knowledge or consent of the associated broker.

(11) Paying a commission or compensation to any person for performing the services of a real estate broker or real estate salesman who has not first secured his license under this chapter.

(12) Being convicted of a crime if the conduct that resulted in the conviction has a direct bearing on whether or not the person should be entrusted to serve the public as a licensed real estate salesman or broker.

(13) Requesting the issuance of a salesman license for the association of the salesman with a broker when the broker does not intend to be associated with the salesman.

(14) Engaging in an unlawful discriminatory practice under IC 22-9-1 [22-9-1-1—22-9-1-12]." [Acts of 1949, ch. 44, §15, p. 129; 1967, ch. 356, §2, p. 1328; 1969 ch. 418, §3, p. 1789; 1977, P.L. 172, §51, p. 749; 1978, P.L. 2, §2558, p. ..... .]

STATEMENT OF THE CASE

This petition is based upon the refusal of the Seventh Circuit United States Court of Appeals to uphold the summary judgment granted by the District Court, Northern District of Indiana, holding that a decision of the Indiana Real Estate Commission should be granted collateral estoppel effect and that this foreclosed any genuine issue of fact in this case where federal jurisdiction is founded upon diversity of citizenship.

The case arises out of a written Agreement to Purchase a hotel in downtown, Fort Wayne, Indiana among one J. L. Fine and Plaintiff, Rudy Lightsey as buyers and First Federal Savings and Loan Association as Seller with Defendant, Harding, Dahm & Co. as broker. Pursuant to the Agreement, Lightsey, deposited a $20,000.00 earnest money deposit with the real estate broker and Defendant in the District Court, Harding, Dahm and Company ("Harding"). The Agreement included an Addendum stating that the $20,000 earnest money deposit would be returned if financing was not available. Fine and Lightsey refused to consummate the Agreement to Purchase, and Harding refused to refund the earnest money deposit on the grounds that financing had become available.

Lightsey tried to get the earnest money back by threatening to bring and by bringing an action before the Indiana Real Estate Commission seeking revocation of Harding's real estate license. Harding submitted a formal answer denying Lightsey's assertions. On April 26, 1978, three hearing commissioners representing the Indiana Real Estate Commission held a formal hearing

lasting almost one day into Lightsey's allegations. Both Lightsey and Harding were present and were represented by attorneys at the hearing. Based upon the hearing and documents submitted to it, the Hearing Committee entered a finding and recommendation to the Hearing Commission that:

> "Therefore, it is the conclusion of the Hearing Committee that James E. Harding, and Harding, Dahm & Company have committed no violation of the Indiana Real Estate License Laws in the real estate transaction heard in this cause,
>
> AND that the monies transmitted in said transaction were disbursed by the broker, James E. Harding, in a manner which was in accordance with the contractual agreement between the parties." (Petitioner's Appendix 3, pp. 17a, 18a)

This recommendation was formally adopted by the Indiana Real Estate Commission on May 25, 1978. (Petitioner's Appendix 3, pp. 17a, 18a) Although he was notified of this finding, Lightsey did not request a rehearing or appeal this decision to the Indiana courts as authorized by the Indiana Administrative Adjudication Act, Indiana Code 4-22-1-14 and this decision became final under Indiana law.

Instead, on August 30, 1978, Lightsey instituted an action in the United States District Court, Northern District of Indiana to recover the $20,000 earnest money. Harding moved for a summary judgment on the grounds that the adjudication by the Indiana Real Estate Commission, including their specific finding that the monies were disbursed by the broker in accordance with the contractual agreement between the parties, collaterally estopped Lightsey's federal court action. The District Court for the Northern District of Indiana

granted the summary judgment motion on the basis that the Real Estate Commission had, in fact, determined the issue before the Court—that the monies were disbursed in accordance with the contract and that the Commission had jurisdiction to render this decision. (Petitioner's Appendix 2) Lightsey appealed this decision and on June 12, 1980, the Seventh U.S. Circuit Court of Appeals reversed Judge Eschbach. That court held that while Indiana courts grant collateral estoppel effect to decisions of administrative agencies, this decision could not be granted collateral estoppel effect because the Commission did not have jurisdiction to construe contracts, to determine the validity or invalidity of contracts or to determine whether all the conditions precedent to the performance of the contract had been satisfied so that its finding that the funds were disbursed in accordance with the contract was not entitled to collateral estoppel effect. (Petitioner's Appendix 1, pp. 5a, 6a)

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the immense importance of state administrative agencies in today's society requires that the effect of their decisions be more fully defined. Not only has the burgeoning of state agencies caused them to have a great influence on people's lives; this phenomenon has also had a tremendous impact on federal-state relations. Federalism can no longer be explained solely in terms of the federal courts' and Congress' relationship to state courts and legislatures. The increasing role of state agencies in this federal framework more than ever requires clear guidelines as to that role. In particular, this case presents an opportunity for this Court to define the role full faith and credit and comity should play when a federal court reviews a state agency's jurisdiction, a role that has not yet been adequately defined.

A.

FULL FAITH AND CREDIT DOES NOT ALLOW THE COURT OF APPEALS TO REVERSE THE TRIAL COURT ON THE GROUND OF LACK OF JURISDICTION.

The United States Constitution leaves no doubt about the effect one state court's decisions will have in the courts of another state. Art. IV, Sec. 1, specifies that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

In 28 U.S.C. Sec. 1738, the United States Congress has filled in the void the framers of the Constitution left in the relationship between federal and state courts by re-

quiring federal courts to extend full faith and credit to state court decisions. This statute mandates that federal courts give such state court proceedings the same full faith and credit as they have in the courts of the state from which they are taken. See *Huron Holding Corp. v. Lincoln M. Operating Co.*, 312 U.S. 183, 85 L. Ed. 725 (1941). *Davis v. Davis*, 305 U.S. 32, 83 L. Ed. 26 (1938). Congress has also extended full faith and credit to all nonjudicial records and books kept in any state public offices. 28 U.S.C. Sec. 1739. The decision of the Indiana Real Estate Commission hereinafter sometimes, "the Commission", is entitled to full faith and credit in the federal court under one or both of these two statutes. Either the Commission's decision was a judicial act[1] and falls under the aegis of 28 U.S.C. Sec. 1738 or that decision was a nonjudicial decision, and the record of that decision is a nonjudicial record kept in the public offices of the Commission (See, Ind. Code 25-34-1-3) which must receive full faith and credit treatment under 28 U.S.C. Sec. 1739. That is precisely the basis the Supreme Court relied upon in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 88 L. Ed. 149, 157-158 (1943) to grant *res judicata* effect to a state agency determination. The *Magnolia* case requires the federal courts in this case to grant the Commission's adjudication "such faith and credit" . . . as it has in the State of Indiana. *Ibid.*, p. 158. Under Indiana law, decisions of agencies acting in a judicial

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[1] The Commission is a quasi-judicial agency. It is governed by the Indiana Administrative Adjudication Act, I.C. 4-22-1-1, *et seq.; Gleason v. Real Estate Commission*, 157 Ind. App. 344, 300 N.E. 2d 116 (1973) and conducts its proceedings in accordance with that act. The distinction between agency judicial and legislative proceedings in Indiana is set forth in *Indiana Telephone Corp. v. Indiana Bell Telephone Co.*, 358 N.E. 2d 218 (Indiana Court of Appeals, 1976). See *infra* p. 17.

capacity are entitled to *res judicata* effect. *Bowen v. United States*, 570 F. 2d 1311 (7th Cir. 1978)

The Court of Appeals' treatment of the Commission's decision in this case blatantly violated full faith and credit. The Commission's finding that the monies were disbursed in accordance with the contract arose as follows. The Plaintiff, Lightsey, filed a grievance with the Commission seeking revocation of Harding's license on the grounds Harding had improperly refused to refund Lightsey his $20,000.00 earnest money deposit. The Real Estate Commission was then required by Indiana statute to determine whether Harding's license should be revoked because it violated the standards set forth in Indiana Code 25-34-1-16, in particular whether Harding had:

> ". . . violated any of the rules and regulations promulgated by the Commission, ha[d] engaged in activity in connection with his license which activity is found to be fraud, misrepresentation or incompetency, or ha[d] been guilty of unprofessional conduct, which includes the following:
>
> (1) Failure to account and remit any monies or documents coming into his possession belonging to others."

Thus, the combination of Lightsey's complaint before the Commission that Harding had improperly refused to return the earnest money deposit and Indiana Code 25-34-1-16(1) required the Commission to discover who was entitled to the escrow deposit. Based on this statutory requirement, the Commission examined the contractual relationship among the parties and determined that the monies had been disbursed in accordance with the contract. Their explicit finding reflected this examination.

But in finding that the Commission had no jurisdiction to render this finding, because it had no jurisdic-

tion: to construe contracts, (Petitioner's Appendix 1, p. 6a) to determine the validity or invalidity of contracts, (Petitioner's Appendix 1, p. 5a), and to determine whether all the conditions precedent to the performance of a contract had been satisfied, (Petitioner's Appendix 1, p. 5a) the Court of Appeals chose to give no weight at all to the Commission's exercise of jurisdiction and stripped the Commission of effective power to decide future cases questioning whether monies are properly disbursed since most such cases involving realtors will involve deciding who has the contractual right to monies. The Court of Appeals also chose to give no weight to the finding by the District Court that the Commission did have jurisdiction to render the finding, despite Judge Eschbach's extensive knowledge of Indiana law and despite the credence Courts of Appeals generally grant to trial courts on doubtful questions of local law. 32 Am. Jur. 2d Federal Practice and Procedure, Sec. 394. Furthermore, the Court of Appeals took this extreme action even though it should have been constrained by the principle that full faith and credit means "not some but full credit . . ." *Davis v. Davis*, 305 US. 32, 83 L. Ed. 26, 29 (1938) and even more so by the full faith and credit requirement that jurisdiction of the initial tribunal (in this case the Commission) must be presumed unless disproved by extrinsic evidence or by the record itself. *Milliken v. Meyer*, 311 U.S. 457, 85 L. Ed. 278, 282 (1940), *Barber v. Barber*, 323 U.S. 77, 89 L. Ed. 82, 87 (1944).

The Court of Appeals did not disprove the Commission's jurisdiction to determine who had the contractual right to the money either by the record or by extrinsic evidence. Instead the Court of Appeals erroneously relied upon two Indiana cases to disprove jurisdiction, one of which explicitly grants Indiana administrative agencies, including this Commission, the very power the

Court refused to uphold—the jurisdiction to decide certain contract disputes.

The Court of Appeals cited *General Telephone Co. of Indiana v. Public Service Commission*, 238 Ind. 646, 154 N.E. 2d 372 (1958) for the proposition that:

> "Under Indiana law, [the Commission] possesses only those powers expressly granted to it by statute." (Petitioner's Appendix 1, p. 5a)

However, even that case, the holding of which is explicitly limited to the Indiana Public Service Commission, (and as will be demonstrated later the Public Service Commission is a legislative-type agency, unlike the Real Estate Commission which is a judicial-type agency) implies that an agency's powers are not bound to the strict terms of a statute.

> ". . . [T]he Public Service Commission 'derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute, it must be concluded that there is none.'" *Ibid.*, p. 373.

The language "unless a grant of power and authority can be found in the statute" implies that administrative bodies also can exercise powers necessarily incident to those powers specifically granted and in fact, that is standard, black letter Indiana law. See 1 Indiana Law Encyclopedia, Administrative Law and Procedure, Sec. 21; *Johnson County Rural Electric Membership Corporation v. Public Service Company of Indiana, Inc.*, 378 N.E. 2d 1 (Ind. App., 1978).

By enacting Indiana Code 25-34-1-16(1), the Indiana legislature required the Commission to determine whether Harding was guilty of failure to account and remit any monies coming into his possession belonging to Lightsey. Since Lightsey's money had been deposited

pursuant to a contract, in order to find to whom the money in this case belonged, the Commission had to have the power to examine the contract and determine who had the contractual right to the money. The power to determine this contractual right was "necessarily incident" to the power specifically granted by Indiana Code 25-34-1-16(1).

This conclusion is *confirmed, not undermined,* by the other case on which the Court of Appeals relied, *Indiana Telephone Corp. v. Indiana Bell Telephone Co.*, 358 N.E. 2d 218 (Ind. App., 1976). That case, which the Court of Appeals found so important, even specifically states that the *administrative-type tribunal,* the Public Service Commission, can in proper cases assume *jurisdiction of contract disputes.*

> "While we hold that under the circumstances of this case, I.C. 8-1-2-5 had no application, it is within contemplation that a provision in a contract between two utility companies could impair the ability of one or both to serve the public to a degree which would properly subject the matter to *jurisdiction of the* Public Service Commission. For example, in addition to those sections of the Public Service Commission Act [I.C. 8-1-1-1, *et seq.* (Burns Code Ed. 1973)] which give direct authority to control specific utility transactions, collateral matters have often been brought before the Commission because of their indirect effect on rate establishment and therefore have been found to be within proper consideration of the Commission." *Ibid.*, page 225. (Emphasis added)[2]

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[2] The Indiana Appellate Court in *Bell* also implied in its footnote on page 224 that the Public Service Commission should sometimes be deferred to by the courts in breach of contract cases.

Much of the reasoning of the *Indiana Bell* case, which rejected that defendant's argument that the Public Service Commission had *exclusive* jurisdiction over contract disputes, rests upon the conclusion that the Public Service Commission did not have such jurisdiction of that particular contractual dispute because it was an administrative-type, not a judicial-type agency. Any order the Public Service Commission makes is: "an administrative order not a judgment." *Ibid.*, p. 224. The Service Commission orders are only "prospective in nature, fixing compensation for the future but not for the past." *Ibid.*, p. 224. The Court's language on page 224 aptly distinguishes the Real Estate Commission from the Public Service Commission.

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind."

It is clear that the Court of Appeals did not thoroughly read the *Indiana Bell* case. Had they done so, they would have known that under Indiana law, even the legislative-type agency, the Public Service Commission has, in the proper cases, jurisdiction to render decisions on contract questions. They would further have realized that *a fortiori* the judicial-type agency, the Real Estate Commission in the proper case has jurisdiction to determine contract cases.

It is clear that by virtue of the statute requiring the Real Estate Commission to render determinations as to

whom monies belong, with the necessary implicit grant of authority to decide contract questions, and in view of the Indiana case law giving even legislative-type agencies jurisdiction over contract questions, that the Court of Appeals was wrong in not finding jurisdiction. But more important, that Court's clearly erroneous reading of Indiana law and its disastrous emasculation of the effectiveness of the Indiana Real Estate Commission, when it should have given credence to that Indiana body's findings, is an egregious violation of full faith and credit. This Court should grant certiorari on this basis alone.

B.

COMITY REQUIRES FINDING A PROPER ASSUMPTION OF JURISDICTION BY THE REAL ESTATE COMMISSION.

Because the jurisdiction of the Federal District Court of the Northern District of Indiana was based upon diversity of citizenship, it was bound to apply Indiana law in this case. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938). Certainly the Court of Appeals gave lip service to this requirement, but what is the standard of care such a federal court must employ when applying state law in diversity cases? Surely a federal court cannot merely cite several cases of the forum state and then freely substitute its own opinion for a fair reading of those cases as well as for other law of the forum. It is the petitioner's opinion that in this kind of diversity case where a state agency rendered a final decision pursuant to a state statute and where a federal court's opinion is based upon a denial of that agency's jurisdiction, which jurisdiction is essential to the agency's exercise of its powers, that comity requires close study before the Court can deny that the agency had jurisdiction—that a freewheeling denial of jurisdiction is prohibited.

In recent years, there appears to be a greater and greater tendency of federal courts to defer to decisions of state tribunals. In accordance with this tendency, the federal courts appear to have extended the doctrine of comity so as to place more reliance upon the role of state tribunals in interpreting both federal and state law. See, for example, *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669 (1971); *Francis v. Henderson*, 425 U.S. 536, 48 L. Ed. 2d 149 (1976); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L. Ed. 482 (1975); *cf. Taylor v. New York City Transit Authority*, 433 F. 2d 665 (2d Cir. 1970).

While principles of comity are often applied in cases involving abstention, it is clear that the principle of comity has a far broader application than that. Comity, for instance, also applies in cases such as this where questions of full faith and credit arise. *cf. Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972). An application of comity in diversity cases is completely sensible. Comity applies in abstention cases to forbid federal courts from enjoining state civil proceedings except in extraordinary cases. *Huffman v. Pursue, Ltd., supra.* While there was no injunction against a state agency in this case, there was a clear and unnecessary interference with the operations of the Indiana Real Estate Commission. Because of the Court of Appeals' erroneous decision that the Commission cannot even "construe" contracts (Petitioner's Appendix 1, p. 6a), the Commission's future decisions involving contracts will have dubious legal effect. This is a serious blow to an agency which regulates an industry in which most of the operations are based upon contracts. Furthermore, because the Commission was formed pursuant to an Indiana statute and was directed by that statute to determine whether monies were properly remitted, the Court of Appeals' decision has also interfered with a decision of the Indiana legislature.

The Court of Appeals' decision has thus unnecessarily interfered with important State of Indiana functions. But comity, extended to diversity cases, requires that federal courts endeavor to interpret and apply state laws ". . . in ways that will not unduly interfere with the legitimate activities of the States." *Francis v. Henderson*, 425 U.S. 536, 48 L. Ed. 2d 149 (1976). Clearly, as the discussion, *supra*, pp. 14-18, demonstrates, the Court of Appeals has instead distorted Indiana law to reach a decision that will have the *maximum interference with Indiana law.*

Comity requires that courts "give scrupulous regard to the rightful independence of state governments." *Beal v. Missouri Pacific R. Corp.*, 312 U.S. 45, 85 L. Ed. 577 (1941). Can one seriously contend that the Court of Appeals met this standard in its decision that Indiana law does not grant the Commission jurisdiction to decide cases involving contracts when the state legislature has by necessary implication required the Commission to decide such cases. Can one seriously contend that the Court of Appeals met this standard when the only case it relied upon expressly granted even to legislative-type agencies the authority to review contracts?

The principle involved in this case is vital to our federal system. Comity must mean that a federal court should avoid declaring that a state agency, which has assumed jurisdiction in a case pursuant to statutory direction, did not have that jurisdiction, unless that lack of jurisdiction is manifest. In the instant case, Indiana law clearly granted the Commission jurisdiction. If comity is to continue to have meaning in diversity cases, this Honorable Court must require federal courts to grant state agencies proper respect and deference. This case

presents an opportunity for the Court to reinforce the principles of comity. The writ of certiorari should be granted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BURT, BLEE, HAWK & SUTTON
By: GEORGE MARTIN
J. PHILIP BURT
12th Floor Lincoln Tower
Fort Wayne, Indiana 46802
(219) 426-1300

Counsel for Petitioner

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-1024

RUDY LIGHTSEY,

Plaintiff-Appellant,

v.

HARDING, DAHM & COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. F 78-C-107—**Jesse E. Eschbach**, *Judge.*

ARGUED OCTOBER 26, 1979—DECIDED JUNE 12, 1980

Before SWYGERT, CUMMINGS, and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Plaintiff-appellant Rudy Lightsey appeals from the district court's order granting summary judgment to defendant Harding, Dahm & Company. The district court held that Lightsey's claim had already been determined by the Indiana Real Estate Commission and was therefore barred from relitigation by collateral estoppel. We reverse because the Indiana Real Estate Commission did not have authority to determine the disputed issue.

I.

In 1979, one J. L. Fine agreed to purchase some real estate in Fort Wayne, Indiana from the First Federal Savings and Loan Association. Appellee Harding, Dahm & Company acted as broker on behalf of the seller. Under an arrangement not disclosed in the record before us, plaintiff-appeliant Lightsey furnished $20,000 as earnest money for the purchase. An addendum to the real estate contract stated that the $20,000 was to be deposited "with the Seller's agent (Harding, Dahm & Company)" and held in escrow contingent upon the buyer's securing of financing for the purchase within twelve days. The addendum concluded that "it is the intention of the parties that should such financing not be available for any reason whatsoever, then those monies shall be returned in full to Rudy Lightsey, the provider of the monies."

Although the purchase was never consummated, Harding, Dahm kept the money, claiming that financing had been secured. After making a formal written demand for the funds, Lightsey filed a grievance with the Indiana Real Estate Commission. The Commission adopted the findings of a hearing committee, which were as follows:

FINDINGS OF FACT

THAT James H. Harding, of Harding, Dahm, & Company real estate company of Fort Wayne, Indiana, acting on behalf of the First Federal Savings and Loan Association of Fort Wayne, Indiana, seller of the real property in said transaction, was duly authorized to receive monies and represent the sellers in their behalf.

CONCLUSION

THEREFORE, it is the conclusion of the Hearing Committee that James E. Harding, and Harding, Dahm, & Company have committed no violation of the Indiana Real Estate License laws in the real estate transaction heard in this cause,

AND that the monies transmitted in said transaction were disburse[d] by the broker, James E. Harding, in a manner which was in accordance with the contractual agreement between the parties.

RECOMMENDATION

THEREFORE, it is the recommendation of the Hearing Committee that James E. Harding, Indiana real estate license No. B-08196, and Harding, Dahm, & Company, Indiana real estate license No. B-18794, shall continue to hold their respective broker's licenses with full priviledges and responsibilities to which the law entitles them as holders of such.

Lightsey did not seek review of the decision in the Indiana courts. He instead filed a complaint in federal district court charging Harding, Dahm with breach of contract.

The district court granted summary judgment for Harding, Dahm. The court held that the Commission's decision resolved "precisely the same issue" presented by Lightsey's complaint. The court further held that the Commission acted in a judicial capacity and had authority to determine breach of contract issues, even though it was not empowered to award damages. The court ruled that the doctrine of collateral estoppel barred Lightsey's complaint.

II.

Indiana courts grant collateral estoppel effect, where appropriate, to decisions of its administrative agencies. *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978). For collateral estoppel effect to be given to an order of an administrative agency, the court must find that the same disputed issues of fact were before it as are before the court, that the agency acted in a judicial capacity, and that the parties had an adequate opportunity to litigate the issues before the agency. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966). Where the issue in the two proceedings are different,

however, the court should not give preclusive effect to the administrative determination. *Porter & Dietsch, Inc. v. F.T.C.*, 605 F.2d 294, 300 (7th Cir. 1979). Prior to making even that inquiry, we must determine whether the issue was properly before the agency. *Bowen v. United States*, 570 F.2d at 1322. We find that the Indiana Real Estate Commission had no statutory authority to determine the issue presented in appellant's suit. We therefore hold that its finding that Harding, Dahm acted in accordance with the contract is not entitled to preclusive effect.

A.

The Indiana Real Estate Commission governs the licensing and regulation of the real estate industry in Indiana. The Commission is composed of a large majority of industry representatives and two citizen members. Ind. Code § 25-34.1-2-1 (Supp. 1979).

As part of its disciplinary powers, the Commission has the authority to "deny, refuse to renew, revoke or suspend" a real estate license of a broker and to levy fines not exceeding $500 for violations of the commission's rules and regulations or a series of enumerated acts. Ind. Code § 25-34.1-2-5 (Supp. 1979). Included as a basis for disciplinary action is a broker's failure "to account and remit any moneys or documents coming into his possession belonging to others." Ind. Code § 25-34-1-16(1) (current version at § 25-34.1-6-1(d)(1) (Supp. 1979)). The district court ruled, without citing any support, that this authority "would seem to include [the power to decide] breach of contract issues, especially as the matter arises in this case." The court also stated that "the general grant of power to determine whether in connection with his license the licensee engaged in fraud, misrepresentation, incompetence or unprofessional conduct [Ind. Code § 25-34-1-16 (current version at Ind. Code § 25-34.1-6-1(d)(13)] would surely provide the Commission with jurisdiction to determine the contractual propriety of the distribution of funds by the real estate broker." The court then concluded that the issues before it and the Commission were the same. We disagree.

The Indiana Real Estate Commission has no general authority to determine breach of contract issues. Under Indiana law, it possesses only those powers expressly granted to it by statute. *General Telephone Co. of Indiana v. Public Service Commission*, 238 Ind. 646, 154 N.E.2d 372 (1958). The sections relied upon by the district court do not empower the Commission to determine the validity or invalidity of a contract or to determine whether all the conditions precedent to the performance of the contract have been satisfied, findings necessary here; at most they permit the Commission to find whether a broker's conduct meets certain standards of professional conduct. *See Indiana Real Estate Commission v. Kirkland*, 256 Ind. 249, 268 N.E.2d 105 (1971). Section 25-34-1-16(1) governs the conduct of a broker only when acting as an agent; breach of any other independent financial arrangement cannot be a basis for license revocation. Harding, Dahm could well have complied with its ethical and professional duties to the seller, but still be in breach of the contract with Lightsey. Moreover, the Commission could have decided only that Harding's conduct was not so egregious as to require the penalty of license suspension or revocation. Given the conclusory nature of the Commission's findings, we cannot be sure what is the basis of the Commission's decision.* But whatever it decided, the Commission could not determine the contractual rights of Lightsey against Harding, Dahm. Those rights can only be determined in a court of law.

In an analogous situation, the Indiana Appellate Court held that the Indiana Public Service Commission had no authority to rule on breach of contract issues. *Indiana Telephone Corp. v. Indiana Bell Telephone Co.*, 358

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* We have no idea what transpired in the hearing committee. The parties did not include a transcript of the hearing before the Commission in the record on appeal. The record before us is so inadequate that we would have difficulty determining whether there was even an opportunity to litigate the issue before the Real Estate Commission. *Bowen v. United States*, 570 F.2d at 1322. We need not remand, however, because of our conclusion that the Commission did not have the power to decide the breach of contract issue.

N.E.2d 218 (Ind. App. 1976). The Indiana Public Service Commission has the power to set charges between competing phone services in the absence of agreement. The court ruled that the absence of an agreement was a jurisdictional requirement. "Since ITC and Bell had voluntarily entered into a written agreement," the court held, "the cited section is without application." *Id.* at 223. Once it was determined that the Commission had no statutory authority over the dispute, it was ousted of jurisdiction. The court concluded,

> the question submitted to the trial court involved the breach of a voluntary contract. The construction and breach of such contracts are matters for judicial determination. The Public Service Commission does not have jurisdiction of such matters. *See In re Gumm* (1949), 118 Ind. App. 695, 83 N.E.2d 487, 488. It has no authority to adjudicate a breach of contract action.

358 N.E.2d at 224.

The Indiana Real Estate Commission had no authority to construe the contract between Lightsey and Harding, Dahm. The finding made by the Commission that the "funds were disburse[d] according to the contract" is therefore not binding because it was not relevant to a dispute over which it had jurisdiction. *United States v. Utah Construction and Mining Co.*, 384 U.S. at 419 n.15. Since the Commission had no authority to decide the issue that was before the district court, the order of the Commission has no collateral estoppel effect. The order of the district court granting summary judgment to Harding, Dahm is accordingly reversed and remanded for further proceedings.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

Decision of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Civil No. F 78-107

RUDY LIGHTSEY, Plaintiff,
vs.
HARDING, DAHM & CO., INC., Defendant.

MEMORANDUM OF DECISION AND ORDER

[Filed November 29, 1978]

This cause is before the court on defendant's motion for summary judgment filed September 20, 1978. The court has had the benefit of oral argument on November 27, 1978. For the reasons discussed below, defendant's motion for summary judgment will be granted.

This breach of contract action, before the court under its diversity jurisdiction, arises out of an uncompleted real estate transaction. Plaintiff, Rudy Lightsey, made an earnest money deposit of $20,000.00 with James E. Harding of the real estate firm of Harding, Dahm & Co., Inc., in connection with an agreement to purchase certain real estate in Fort Wayne, Indiana. When the transaction was not completed, Lightsey wished to recover the $20,000.00 earnest money but Harding would not return it. Lightsey

contends that it was impossible to obtain financing for the real estate purchase, that he was thus relieved of any obligations under the agreement to purchase the real estate and that he was, therefore, entitled to the return of the earnest money.

Defendant, Harding, contends that Lightsey did secure financing but that the transaction was not closed on the agreed upon date, July 1, 1977, causing Lightsey to forfeit the earnest money. He thus did not return the earnest money to Lightsey.

Lightsey contacted the Indiana Real Estate Commission regarding the earnest money. He was advised to make a formal demand upon Harding for the return of the money and if not then satisfied, to file a complaint with the Commission. When Lightsey's demand did not result in the return of the earnest money, he filed a complaint with the Commission on December 13, 1977, charging that Harding wrongfully refused to refund the $20,000.00 earnest money.

A hearing was held on April 26, 1978 before a three-member Hearing Committee of the Indiana Real Estate Commission, at which both parties were represented by attorneys. Though informed that he could be represented by private counsel at the hearing, Lightsey chose to have his case presented by a staff attorney from the Indiana Attorney General's office. The case was presented for nearly a day.

The three-member Hearing Committee found that James E. Harding and Harding, Dahm & Co., Inc., "have committed no violation of the Indiana Real Estate License Laws in the real estate transaction heard in this cause: and "that the monies transmitted in said transaction were dis-

bursed by the broker, James E. Harding, in a manner which was in accordance with the contractural (sic) agreement between the parties." The decision of the Hearing Committee was accepted by the Indiana Real Estate Commission on May 25, 1978.

Under Ind. Code §4-22-1-14* Lightsey could have appealed the decision of the Real Estate Commission to the circuit or superior court of Allen County within 15 days of notice of the Commission's final decision. This he did not do. Instead on August 30, 1978, Lightsey filed this suit in federal court, notwithstanding Ind. Code §4-22-1-14 which provides that unless a proceeding for review is commenced within 15 days of notice of the Commission's final decision, any and all rights of judicial review and all rights of recourse to the courts shall terminate.

In order to succeed in this action, the plaintiff must establish that the defendant wrongfully failed to return the $20,000.00 earnest money in contravention of agreements among the parties to the real estate transaction. This, however, is precisely the same issue that was heard and decided by the Indiana Real Estate Commission. As set out above, the Commission concluded that the monies transmitted in such transaction were disbursed by the broker, James E. Harding, in a manner which was in accordance with the contractual agreement among the parties.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate oppor-

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* The Indiana Administrative Adjudication Act, Ind. Code §§4-22-1-1 through 4-22-1-30, applies to the Indiana Real Estate Commission. *Gleason* v. *Real Estate Commission*, 300 N.E. 2d 116 (Ind. Ct. App. 1973).

tunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-60 (1966). *See also Hickel* v. *Oil Shale Corp.*, 400 U.S. 48, 91 S.Ct. 196 (1970); *Fruehauf Corp.* v. *Review Board of the Indiana Employment Security Division*, 269 N.E.2d 184 (Ind. Ct. App. 1971).

Further, collateral estoppel principles are applicable to administrative findings. Under the modern view, the findings of independent administrative agencies, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. *United States* v. *Utah Construction & Mining Co., supra; Fruehauf, supra.* The rule which forbids reopening a matter once judicially determined by a competent authority applies to judicial and quasi judicial acts of public officers and boards. *Landreth* v. *Wabash Railroad Co.*, 153 F.2d 98 (7th Cir. 1946).

The *Landreth* case involved an award of the Illinois Industrial Commission which had ripened into an enforceable award under the Illinois Workmen's Compensation Act. Plaintiff appealed the decision but did not exhaust all appeals available under the provisions of the Illinois Workmen's Compensation Act. Instead, plaintiff filed suit in the federal district court under the Federal Employers' Liability Act on the basis of the same accident which was the subject of his Illinois Workmen's Compensation claim.

The U.S. Court of Appeals for the Seventh Circuit found that where the parties and issues are identical, where testimony was heard and evidence introduced before the administrative agency and where the decision of the agen-

cy was final, the matter should not be reopened in federal court. Any error in the administrative proceedings should have been appealed in the manner prescribed by the Illinois Workmen's Compensation statute. The court added, "This remedy plaintiff did not choose to pursue and it is too late to raise it here." 153 F.2d at 100. *See also United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

The essence of collateral estoppel is that some question or fact in dispute has been judicially or finally determined by a court of competent jurisdiction between the same parties or their privies. Where there is a second action between the parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause or demand, the judgment in the first suit operates as a collateral estoppel as to those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended. 1B Moore's Federal Practice ¶0.441[2] at 3777.

Where some fact or question has been determined and adjudicated in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, the former adjudication of the fact or question will be conclusive on the parties in the latter suit, regardless of the identity of the causes of action, or lack of it, in the two suits. *Fruehauf, supra; Town of Flora* v. *Indiana Service Corp.*, 53 N.E.2d 161 (Ind. 1944); *see also Middlekamp* v. *Hanewich*, 364 N.E.2d 1024 (Ind. Ct. App. 1977).

There are four conditions which must be fulfilled for collateral estoppel to apply to bar later litigation:

(1) The former determination must have been rendered by a tribunal of competent jurisdiction.

(2) The matter now in issue must have been determined in the former suit.

(3) The controversy adjudicated in the former action must have been between the parties to the present suit.

(4) Judgment in the former suit must have been rendered on the merits.

Middlekamp, supra; Fruehauf, supra.

In addition, when dealing with a determination by an administrative tribunal, the determination must have been made when the tribunal was acting in a judicial capacity rather than in a rule making capacity. Davis, *Administrative Law of the Seventies,* Chapter 18, §18.02, p. 427 (1976).

(1) The Indiana Real Estate Commission was a tribunal of competent jurisdiction to determine whether Harding transmitted monies in a manner which was in accordance with the contractual agreement between the parties.

Ind. Code §25-34-1-16 specifically grants the Real Estate Commission the power to determine whether the real estate licensee has engaged in activity in connection with his license which activity is found to be fraud, misrepresentation, incompetence, or unprofessional conduct, including failure to remit any monies or documents coming into his possession belonging to others.

Plaintiff contends that the Commission does not have the jurisdiction to determine issues of breach of contract or to award money damages. Plaintiff is correct in his contention that the Commission does not have jurisdiction

to award damages, but the Commission does indeed have jurisdiction to determine breach of contract issues. The specific grant of authority to determine whether the licensee failed to remit any monies coming into his possession belonging to others would seem to include breach of contract issues, especially as the matter arises in this case. But even if it does not, the general grant of power to determine whether in connection with his license the licensee engaged in fraud, misrepresentation, incompetence or unprofessional conduct would surely provide the Commission with jurisdiction to determine the contractual propriety of the distribution of funds by the real estate broker.

(2) The precise issue plaintiff raises before this court, whether Harding wrongfully refused to return plaintiff's earnest money, was previously decided by the Indiana Real Estate Commission. There could hardly be a clearer indication of this than the text of the Commission's findings:

FINDINGS OF FACT

THAT James E. Harding, of Harding, Dahm, & Company, real estate company of Fort Wayne, Indiana, acting on behalf of the First Federal Savings and Loan Association of Fort Wayne, Indiana, seller of the real property in said transaction, was duly authorized to receive monies and represent the sellers in their behalf.

CONCLUSION

THEREFORE, it is the conclusion of the Hearing Committee that James E. Harding, and Harding, Dahm, & Company have committed no violation of the Indiana Real Estate License Laws in the real estate transaction heard in this cause,

AND that the monies transmitted in said transaction were disbursed by the broker, James E. Harding, in a manner which was in accordance with the contractual agreement between the parties.

The fact that the demand in the prior action was that Harding's real estate license be suspended or revoked while the present demand is for the return of the earnest money is of no consequence. *See Groom* v. *Kawasaki Motors Corp., U.S.A.*, 344 F.Supp. 1000 (W.D. Okla. 1972). Even if the second suit involves a different claim, cause, or demand, the judgment in the former suit operates as a collateral estoppel as to those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended. 1B Moore's Federal Practice ¶0.441[2] at 3777; *Town of Flora, supra.* It is further clear that the initial judgment necessarily depended on a determination that Harding did not wrongfully refuse to refund the earnest money; the Commission found that he disbursed the monies in a manner which was in accordance with the contractual agreement between the parties.

(3) The controversy adjudicated in the former action was between the parties to the present suit. The complaint before the Indiana Real Estate Commission was filed by Rudy Lightsey on December 13, 1977 charging that James E. Harding and Harding, Dahm & Co., Inc., wrongfully refused to return a $20,000.00 earnest money deposit to Lightsey. Rudy Lightsey is again the plaintiff and Harding, Dahm & Co., Inc., the defendant in cause number F 78-107 filed August 30, 1978 in this court.

(4) The judgment in the previous suit was rendered on the merits.

Finally, in making its determination, the Indiana Real Estate Commission was acting in a judicial capacity, not in a rule making capacity. The distinction is set out in *Indiana Telephone Corp.* v. *Indiana Bell Telephone Co.*, 358 N.E.2d 610 (Ind. Ct. App. 1976), *modified on other grounds*, 360 N.E.2d 610 (Ind. Ct. App. 1977).

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

In the hearing before the Indiana Real Estate Commission, Lightsey filed a formal written complaint; Harding filed an answer to the complaint with numerous exhibits attached. Other exhibits were introduced as evidence in the hearing. The parties were given prior notice of the setting of a hearing. On April 26, 1978, a hearing was held before three Hearing Commissioners of the Indiana Real Estate Commission. At the hearing, both parties were represented by attorneys; the case was presented for nearly a day. On May 3, 1978, the three Hearing Commissioners entered *Findings of Fact, Conclusions,* and *Recommendations.* The parties were furnished copies of the decision of the Real Estate Commission as provided in Indiana Administrative Adjudication Act.

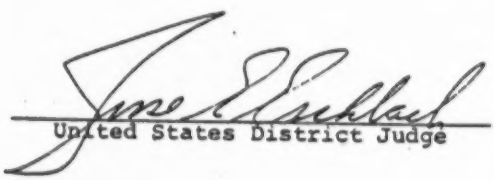
The factual issue of whether Harding wrongfully refused to return the earnest money to Lightsey having been decided by the previous adjudication, there remains no genuine issue as to any material fact. Summary judgment on the basis of collateral estoppel is therefore appropriate and defendant's motion for summary judgment filed September

20, 1978 will be granted. *McCracklin* v. *Fowler*, 285 F.Supp. 41 (E.D. Wis. 1968), *aff'd*, 411 F.2d 580 (7th Cir. 1969); *Case & Co., Inc.* v. *Board of Trade of City of Chicago*, 523 F.2d 355 (7th Cir. 1975).

ORDER

Accordingly, defendant's motion for summary judgment filed September 20, 1978 is hereby granted and the clerk of this court is directed to enter judgment against the plaintiff and in favor of the defendant.

Entered this 29th day of November, 1978.



APPENDIX 3

Decision of Indiana Real Estate Commission

STATE OF INDIANA
COUNTY OF MARION—SS:

Rudy Lightsey, Plaintiff,

vs.

Harding, Dahm, & Co. and James E. Harding, Defendants.

You are hereby advised that the decision of the Hearing Committee of the Indiana Real Estate Commission in the above cited cause is as follows:

FINDINGS OF FACT

THAT James E. Harding, of Harding, Dahm, & Company real estate company of Fort Wayne, Indiana, acting on behalf of the First Federal Savings and Loan Association of Fort Wayne, Indiana, seller of the real property in said transaction, was duly authorized to receive monies and represent the sellers in their behalf.

CONCLUSION

THEREFORE, it is the conclusion of the Hearing Committee that James E. Harding, and Harding, Dahm, & Company have committed no violation of the Indiana Real Estate License Laws in the real estate transaction heard in this cause,

AND that the monies transmitted in said transaction were disbursed by the broker, James E. Harding, in a

manner which was in accordance with the contractual agreement between the parties.

RECOMMENDATION

THEREFORE, it is the recommendation of the Hearing Committee that James E. Harding, Indiana real estate license No. B-08196, and Harding, Dahm, & Company, Indiana real estate license No. B-18794 shall continue to hold their respective broker's licenses with full privileges and responsibilities to which the law entitles them as holders of such.

HEARING COMMISSIONERS:

Harley W. Snyder, Presiding Officer

Barbara Terry, Commissioner

David C. Fair, Commissioner

Diana L. Jones, Executive Secretary

Subscribed and sworn to before me, a Notary Public in the County of _____, on this 3rd day of May, 1978.

My Commission Expires:

February 2 1981

NOTARY PUBLIC:

Accepted by the Indiana Real Estate Commission this 25th day of May, 1978.

Robert L. Jarrett, Chairman
Indiana Real Estate Commission

Diana L. Jones, Executive Secretary
Indiana Real Estate Commission

SUPREME COURT, U.S.
FILED
DEC 19 1980
MICHAEL RODAK, JR., CLERK

NO. 80-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARDING, DAHM & COMPANY, INC.,
Petitioner,

versus

RUDY LIGHTSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEVINE AND KRELL, P.C.
By: DAVID N. LEVINE
1800 Century Boulevard
Suite 1105
Atlanta, Georgia 30345
(404) 321-4838
Counsel for Respondent

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III. CERTIFICATE OF SERVICE	9

IN THE

Supreme Court of the United States

October Term, 1980

NO. 80-387

HARDING, DAHM & COMPANY, INC.,
Petitioner,

versus

RUDY LIGHTSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASONS FOR DENYING WRIT

The Writ should be denied because Petitioner's Questions Presented for Review and Reasons for Granting the Writ raise issues which were neither raised below nor considered by the Court of Appeals and this Court does not ordinarily review issues neither raised nor briefed below.

Furthermore, the Petition fails to allege or disclose any conflict between the ruling of the Court of Appeals and another court of appeals on the same matter, nor has Petitioner shown that the decision is in conflict with applicable state law; although contending certain statutory implications, the Petition fails to disclose any state law or cases in conflict with the Court of Appeals decision. Nor has Petitioner presented any other valid or cogent reason why this case is important enough for review by this Court.

Also, the doctrines of full faith and credit and comity are inapplicable to the case herein until it can be shown that the Indiana Real Estate Commission had jurisdiction to decide the contractual issues, a point which was decided adversely to Petitioner by the Court of Appeals. The Court of Appeals decision was correct and should not be disturbed.

A.

The issues of full faith and credit and comity presented herein by Petitioner were neither raised, discussed, nor briefed by the parties below, and obviously were not considered by the Court of Appeals. Such issues should not be raised for the first time at the Supreme Court level. *Tyrrell v. District of Columbia*, 243 U.S. 1; *Adickes v. Kress & Co.*, 398 U.S. 144, 147, Note 2. Petitioner is attempting to raise issues and arguments that were not passed on below, and the Court should not permit such questions to be heard for the first time at the Supreme Court level.

B.

The Petition does not allege or disclose any conflict between the decision of the Court of Appeals and any other court of appeals on the same matter.

C.

Petitioner has attempted, by some extremely strained statutory construction, to show that the Court of Appeals decision conflicts with alleged state law. Petitioner's statutory constructions are more the product of wishful thinking than of sound legal reasoning and Petitioner has cited no cases or statutes in support of its position.

D.

The case is of very limited significance other than to the actual litigants, because of the finding by the Court of Appeals that the Indiana Real Estate Commission had no jurisdiction to determine the contract issues. The case would be of much greater significance if the issue below had not been jurisdiction. By reason of lack of jurisdiction, the matter assumes significance to the litigants only, and not to the real estate industry as a whole, and does not require a Supreme Court definition of the role of real estate commissions and/or the courts in grievance procedures.

E.

The Court of Appeals decision is clearly correct. The issue on a grievance is ethical conduct, not contract issues. The Real Estate Commission is clearly without statutory authority to determine contract issues, contractual rights being for a court of law. Petitioner could have complied "with its ethical and professional duties to the seller, but still be in breach of its contract with Lightsey" (Petitioner's Appendix 1, page 5a).

F.

Petitioner's full faith and credit argument overlooks and ignores a most basic and elemental point of law, to wit: no judicial or administrative decision can have any effect whatsoever where such court or administrative agency does not have jurisdiction to decide the issue in question. *Bowen v. United States*, 570 F.2d 1311, 1322 (7th Cir. 1978). The Court of Appeals determined that the Indiana Real Estate Commission had no such jurisdiction (Petitioner's Appendix 1, page 6a); therefore, full faith

and credit is irrelevant until Petitioner can first show jurisdictional authority in the Real Estate Commission. Full faith and credit is not the issue at all, the issue is jurisdiction, and without jurisdiction, threre can be no full faith and credit.

Petitioner's statement on page 11 of its Brief that "full faith and credit does not allow the Court of Appeals to reverse the Trial Court on the ground of lack of jurisdiction" is absolutely ludicrous. A judgment void is of no force or effect.

Briefly, as stated in the Court of Appeals decision, "We find that the Indiana Real Estate Commission had no statutory authority to determine the issue presented in appellant's suit. We therefore hold that its finding that Harding, Dahm acted in accordance with the contract is not entitled to preclusive effect" (Petitioner's Appendix 1, page 4a).

No judicial or administrative decision can have any effect where such court or administrative agency had no jurisdiction to decide the question in issue. *Bowen v. United States*, 570 F.2d 1311 (1978). Petitioner cites *Bowen*, but in *Bowen* it was held that the matter was properly before the National Transportation Safety Board. Here the Court of Appeals held the contract issues were not before the Real Estate Commission.

Petitioner overlooks the fact that the issue before the Real Estate Commission was ethical conduct and not contract construction, and that the contract can be violated without ethical restraints being violated (Petitioner's Appendix 1, page 5a).

In *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941), it was noted that *valid* judgments are subject to full faith and credit (emphasis added).

Petitioner's strained construction of Indiana Code §25-34-1-16 is clearly dealt with by the Court of Appeals (Petitoner's Appendix 1, page 4a). The Court of Appeals decided the matter adversely to Petitioner and Petitioner is seeking to rehash old matters before this Court. The issue is not entitlement to money but ethical conduct.

The jurisdictional aspect of the matter before the Indiana Real Estate Commission would be analogous to disciplinary proceedings before a Bar Association. A finding of ethical misconduct on the part of an attorney by a Bar Association certainly does not entitle the aggrieved person to a judgment against such lawyer in a court of law, the theory being that the issue before the Bar would be standard of conduct and the issue in court something else.

On page 17 of its Brief, Petitioner attempts to show that the Real Estate Commission *should have* jurisdiction because "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under law supposed ready to exist". Such characterization of the Real Estate Commission is unfounded because Petitioner has put forth no statutory authority for the proposition that the Real Estate Commission can enforce liabilities. The Real Estate Commission's powers are limited solely to deny, refuse to renew, revoke or suspend any license issued. Indiana Code §25-34-1-16.

Despite Petitioner's characterizations of the Court of Appeals decision as being clearly erroneous and freewheeling (page 18, Petitioner's Brief), nowhere in Petitioner's Brief has it cited any cases or statutes supporting its proposition that the Indiana Real Estate Commission had the authority to determine the validity of contracts, nor has Petitioner cited any authority for its position that

a determination of contract validity is necessary and vital in this case.

Petitioner's comity argument has no more validity than its full faith and credit argument under the facts and decisions of the Court of Appeals herein. Petitioner's assertions as to the jurisdiction of the Indiana Real Estate Commission are unsupported by any cases or statutes and appear to be the mere conclusions or wishful thinking of Petitioner.

Petitioner has relied on certain cases cited on page 19 of its Brief, to support the proposition that the Federal courts have extended the doctrine of comity so as to place more reliance upon the role of state tribunals in interpreting both Federal and state law. While Petitioner's abovementioned statement does have some validity, each and every case cited by Petitioner is founded upon or related to a state *criminal* prosecution, wherein the issue of jurisdiction of the Federal court to enjoin the state proceeding was involved, which issue was not at all involved in this case. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed. 2d 482 (1975); *Beal v. Missouri Pacific R. Corp.*, 85 L.Ed. 577, 312 U.S. 45 (1941); *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971); *Francis v. Henderson*, 425 U.S. 536, 48 L.Ed. 2d 149 (1976).

Petitioner carries forward its erroneous assertion that the Commission was directed by statute to determine whether monies were properly remitted, when in fact, as pointed out hereinabove, the Commission was directed to determine if license laws were violated, which, as the Court of Appeals said, does not include contract construction (Petitioner's Appendix 1, page 5a). Petitioner also confuses the role of the Real Estate Commission in regulating the real estate industry. Clearly, its regulatory

powers concern conduct, and not contract construction.

Furthermore, Petitioner's quotation from *Beal v. Missouri Pacific R. Corp.*, cited on page 20 of its Brief, is incomplete and taken out of context. The actual quote, at 312 U.S. 50, is as follows:

> "*And in the exercise of the sound discretion which guides the determination of courts of equity*, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds." (Emphasis added.)

The District Court herein was not sitting as a court of equity, nor did the Court of Appeals rule on slight or inconsequential grounds. Indeed, the decision of the Court of Appeals is grounded in the most basic of legal principles, to wit: lack of jurisdiction, which can never be held to be slight or inconsequential grounds.

It is also noted that in its opinion, on page 4 thereof, the Court of Appeals noted that the District Court ruled, "without citing any support, ..." The Petitioner has not been able to supply the District Court or the Court of Appeals, nor this Court, with any support, statutory or case law, for its position, or to show why the Court of Appeals was in error.

The Seventh Circuit Court of Appeals in *Bowen, supra*, at 1322, noted that,

> "At the same time, however, there is an increasing recognition that the rules of issue preclusion should not be inexhorably applied when a fair opportunity to litigate the issue in the prior proceeding was lacking."
>
> "Here the underlying policy, viz., that one fair opportunity to litigate an issue is enough, is best

served by the rule that issue preclusion applies to a final administrative determination of an issue properly before an agency acting in judicial capacity *when both parties were aware of the possible significance of the issue in later proceedings* and were afforded a fair opportunity to litigate the issue and obtain judicial review." *Bowen, supra,* at page 1322.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Petitioner herein with a copy of the within and foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed to:

George Martin, Esquire
J. Philip Burt, Esquire
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This 9 day of December, 1980.

LEVINE AND KRELL, P.C.

DAVID N. LEVINE